

No. 89-862

3

Supreme Court, U.S.  
FILED  
JAN 29 1990

~~JOSÉ A. CRANIO, JR.~~  
CLERK

In the Supreme Court of the United States  
OCTOBER TERM, 1989

SYBIL YOUNG AND RODERICK YOUNG, PETITIONERS

v.

UNITED STATES DEPARTMENT OF JUSTICE AND  
CHEMICAL BANK, N.A.

*ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT*

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

KENNETH W. STARR  
*Solicitor General*  
STUART M. GERSON  
*Assistant Attorney General*

LEONARD SCHAITMAN  
JEFFREY CLAIR  
*Attorneys*

*Department of Justice  
Washington, D.C. 20530  
(202) 633-2217*

1807

### **QUESTION PRESENTED**

Whether the Right to Financial Privacy Act, 12 U.S.C. 3401 *et seq.*, which requires that agencies and departments of the United States adhere to certain procedural requirements when obtaining bank account records, is applicable to an Assistant United States Attorney who, at the behest of a foreign government, is appointed by a federal district court as a judicial commissioner under 28 U.S.C. 1782(a) for the sole purpose of assisting a foreign government's investigation and prosecution of violations of foreign criminal law.

(I)



## TABLE OF CONTENTS

	Page
Opinions below .....	1
Jurisdiction .....	1
Statement .....	1
Argument .....	7
Conclusion .....	14

## TABLE OF AUTHORITIES

### Cases:

<i>Doe v. Board of Professional Responsibility of the District of Columbia Court of Appeals</i> , 717 F.2d 1424 (D.C. Cir. 1983) .....	9
<i>Fonseca v. Blumenthal</i> , 620 F.2d 322 (2d Cir. 1980) .....	13
<i>John Deere Ltd. v. Sperry Corp.</i> , 754 F.2d 132 (3d Cir. 1985) .....	12
<i>Letters Rogatory Issued by the Director of Inspection of the Government of India, In re</i> , 385 F.2d 1017 (2d Cir. 1967) .....	13
<i>Request For Assistance From Ministry Of Legal Affairs Of Trinidad &amp; Tobago, In re</i> , 848 F.2d 1151 (11th Cir. 1988), cert. denied, 109 S. Ct. 784 (1989) .....	7, 9, 13
<i>Request For International Judicial Assistance (Letter Rogatory) From The Federal Republic of Brazil, In re</i> , 700 F. Supp. 723 (S.D.N.Y. 1988) .....	8
<i>Request For Judicial Assistance From Seoul District Criminal Court, In re</i> , 555 F.2d 720 (9th Cir. 1977) .....	9
<i>United States v. Stuart</i> , 109 S. Ct. 1183 (1989) .....	12

### Statutes:

<i>Right to Financial Privacy Act</i> , 12 U.S.C. 3401 <i>et seq.</i> .....	1-2, 7
12 U.S.C. 3401(3) .....	9, 10

Statutes – Continued:	Page
12 U.S.C. 3402 .....	4, 9
12 U.S.C. 3403 .....	4
12 U.S.C. 3409 .....	3, 6, 7
12 U.S.C. 3413(d) .....	5, 11
28 U.S.C. 1782 .....	2, 5, 6, 7, 8, 11, 12
28 U.S.C. 1782(a) .....	2, 5, 8, 9, 10, 11, 13
Miscellaneous:	
S. Rep. No. 1580, 88th Cong., 2d Sess. (1964) ..	9, 11
Smit, <i>International Litigation Under the United States Code</i> , 65 Colum. L. Rev. 1015 (1965)...	9
United States Attorneys' Manual (Oct. 1988) ...	11

**In the Supreme Court of the United States**  
**OCTOBER TERM, 1989**

---

**No. 89-862**

**SYBIL YOUNG AND RODERICK YOUNG, PETITIONERS**

**v.**

**UNITED STATES DEPARTMENT OF JUSTICE AND  
CHEMICAL BANK, N.A.**

---

***ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT***

---

**BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION**

---

**OPINIONS BELOW**

The opinion of the court of appeals (Pet. App. A1-A27) is reported at 882 F.2d 633. The opinions of the district court (Pet. App. A28-A40, A42-A55) are unreported.

**JURISDICTION**

The judgment of the court of appeals (Pet. App. A57-A58) was entered on August 8, 1989. A petition for rehearing was denied on August 30, 1989 (Pet. App. A59-A60). The petition for a writ of certiorari was filed on November 27, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

**STATEMENT**

Petitioners contend that the Department of Justice and Chemical Bank violated the Right to Financial Privacy Act,

12 U.S.C. 3401 *et seq.*, in the course of transmitting financial records and other information on petitioners' bank accounts to the government of Bermuda.

1. The case arises out of Bermuda's investigation and criminal prosecution of petitioners for violations of Bermudian currency control laws. On November 14, 1986, the Attorney General of Bermuda sent an international request for judicial assistance to the office of the United States Attorney for the Southern District of New York (C.A. App. A24-A25). The request alleged that petitioners had transferred significant sums of money to Chemical Bank, in violation of Bermudian Exchange Control regulations (C.A. App. A24). The Attorney General of Bermuda accordingly requested the assistance of the U.S. Attorney's office in obtaining copies of petitioners' bank account records and pertinent statements from bank officers or employees (C.A. App. A24). He further stated that all information would be used solely for investigation and prosecution of the alleged offenses (C.A. App. A25).

On January 27, 1987, Assistant United States Attorney David W. Denton applied to the United States District Court for the Southern District of New York for an order appointing him a commissioner under 28 U.S.C. 1782 "for the purpose of taking testimony and obtaining evidence in accordance with a request for international judicial assistance issued by the Attorney General of Bermuda" (C.A. App. A27). The application appended the Bermudian Attorney General's request and stated that testimony and evidence secured by the commissioner would "be certified and transmitted to the requesting party through appropriate channels" (C.A. App. A28).

On January 28, 1987, the district court issued an order appointing AUSA Denton a commissioner under 28 U.S.C. 1782(a). The order, which had been drafted and submitted for approval by the AUSA, authorized the commissioner

to issue subpoenas, to obtain evidence in conformance with the request for assistance, and to submit all evidence obtained to the government of Bermuda (C.A. App. A32). The court also directed that its order and supporting application be sealed and that evidence obtained by the commissioner be retained by the United States Department of Justice for such use as the Attorney General or his designated representatives may deem appropriate (C.A. App. A32-A33).

Shortly thereafter, AUSA Denton, citing his authority as a commissioner, requested that the court approve a subpoena commanding Chemical Bank to produce all records pertaining to petitioners' accounts (C.A. App. A34-A36). Denton also requested that the court, pursuant to 12 U.S.C. 3409, (1) order Chemical Bank not to disclose the existence of the subpoena or the bank's compliance with the subpoena and (2) authorize the government to delay notifying petitioners of the subpoena for ninety days (C.A. App. A35-A37). In support of this request, Denton advised the court that disclosure of the subpoena could prevent meaningful investigation of the alleged violations of Bermudian law. In particular, he noted that the Bermudian Attorney General had indicated that notifying petitioners would risk removal or destruction of evidence, intimidation of witnesses, and petitioners' flight from prosecution (C.A. App. A34-A35). On January 30, 1987, the court issued an order delaying notification of petitioners and barring Chemical Bank from disclosing any information pertaining to the subpoena (C.A. App. A37).

The commissioner subsequently transmitted to the Bermudian authorities records and affidavits pertaining to petitioners' bank accounts (C.A. App. A21-A22). Based on the information provided by Chemical Bank, Bermudian authorities charged petitioners with 47 counts of violating Bermuda's criminal laws: 22 counts of making a false state-

ment for the purpose of buying foreign currency; 14 counts of illegally exporting foreign currency notes; and 11 counts of illegally exporting travelers checks (C.A. App. A12-A16). On August 25, 1987, petitioner Sybil Young pleaded guilty to 46 counts of the indictment, and petitioner Roderick Young pleaded guilty to 45 counts (C.A. App. A12-A16). The Youngs received consecutive sentences of up to two years in prison on each count or, in the alternative, fines on each count that added up to \$775,000 (for Sybil Young) and \$184,500 (for Roderick Young) (C.A. App. A15-A16).

2. Following their criminal convictions in Bermuda, petitioners filed separate suits under the Right to Financial Privacy Act against Chemical Bank (88-6314 C.A. App. A25-A31) and the Department of Justice (C.A. App. A3-A7). In the suit against Chemical Bank, petitioners alleged that the bank had released customer records in a manner that violated 12 U.S.C. 3403 (88-6314 C.A. App. A27).<sup>1</sup> In the suit against the Department of Justice, petitioners alleged that the Department obtained and disclosed bank account information in violation of 12 U.S.C. 3402 (C.A. App. A5). Petitioners demanded compensatory and punitive damages against both Chemical Bank and the Department (C.A. App. A6).

The district court, in separate opinions and judgments, dismissed each complaint for failure to state a claim upon which relief could be granted (Pet. App. A41, A56). The district court held that the statute did not apply to the

---

<sup>1</sup> Petitioners also alleged that Chemical Bank, in violation of state law, had breached certain implied contractual provisions barring disclosure of account information and that the Bank's disclosures constituted a tortious intrusion on their right to privacy (88-6314 C.A. App. A28-A29). The district court dismissed these state law claims (Pet. App. A52-A55). The court of appeals modified that aspect of the judgment to provide that these claims would be dismissed without prejudice, with leave to refile in New York state court (Pet. App. A27).

United States Attorney's Office when it acts as a commissioner under 28 U.S.C. 1782 and procures financial information for use in a foreign proceeding (Pet. App. A34-A35, A49). First, the court reasoned that the commissioner merely acts as a conduit of information to the foreign tribunal and it is therefore the foreign tribunal that has "access to" or "obtains" financial records within the meaning of the Right to Financial Privacy Act. Second, the court reasoned that neither the district court itself nor a commissioner acting with powers conferred by the court is a "Government authority" for purposes of those statutory provisions regulating access by a "Government authority" to bank records (Pet. App. A36-A37). Finally, the district court held that disclosures made under 28 U.S.C. 1782(a) are exempted from the statute's coverage by 12 U.S.C. 3413(d), which states that the Right to Financial Privacy Act does not authorize the withholding of financial records that must be reported in accordance with federal law (Pet. App. A37).

3. The court of appeals affirmed. In a single opinion and judgment disposing of both district court cases, the court of appeals held that the Right to Financial Privacy Act does not apply to court-appointed commissioners when they seek information from financial institutions with court-ordered subpoenas (Pet. App. A13). First, the Court reasoned that the Act was principally intended to regulate the release of information in circumstances where, unlike here, adequate, alternative controls were absent. In this case, the commissioner's subpoena had been reviewed and approved by the district court before it was served on the bank (Pet. App. A9).

Second, the court reasoned that a contrary interpretation would frustrate the objectives of 28 U.S.C. 1782(a) by constraining the government's ability to assist foreign governments in obtaining information, thereby undermining our

government's ability to obtain reciprocal assistance abroad (Pet. App. A10-A11).

Third, the court found that subjecting a governmental commissioner's actions to the Act would not afford bank customers any additional protections. In this regard, the Court noted that the Bermudian government could have obtained the same information in the same way without conforming to the Act simply by requesting that a private individual seek appointment as commissioner (Pet. App. A11).

Fourth, the court found that exempting governmental commissioners from the Act would not increase the potential for governmental abuse in improperly obtaining bank records under the guise of acting as a court-appointed commissioner. The court explained that the governmental officers could obtain appointment only at the request of a foreign government (Pet. App. A12). The court further explained that any putative risks posed by the government's retention of files obtained through a commissioner's activities could easily be minimized by an appropriate district court order directing the commissioner to place any retained records under seal (Pet. App. A12 n.7).

Finally, the court held that the government was not estopped from denying that the Act applied in light of its prior request that the district court, under authority of 12 U.S.C. 3409 of the statute, order the bank not to disclose the existence of the subpoena.<sup>2</sup> The court noted that

---

<sup>2</sup> Petitioners mistakenly assert (Pet. 7 n.4) that the court of appeals reserved the question of whether a bank can be restrained from notifying its customer under 12 U.S.C. 3409, finding that this question was "not a trivial one." In fact, the court of appeals in the cited passage reserved the entirely different question of whether a "court would have had the power, *absent the provision in the [Right to Financial Privacy Act]*," to issue a delayed-notification order (Pet. App. A16 (emphasis added)). We observe that 28 U.S.C. 1782 may well provide implicit

the government had not intended to mislead the court, that the question of the Act's applicability was not settled at the time the records were sought, and that the Bank had indicated it believed the Act applied to the commissioner's request (Pet. App. A15). The court therefore held that estoppel would not lie on the facts of this case.

#### ARGUMENT

The decision below does not conflict with any decision of this Court or of another court of appeals. It correctly holds that the Right to Financial Privacy Act, 12 U.S.C. 3401 *et seq.*, does not create a cause of action for damages against the United States Attorney's Office when it acts as commissioner under 28 U.S.C. 1782 and procures financial information for use in a foreign proceeding. Further review by this Court is therefore unwarranted.

1. Petitioners err in asserting (Pet. 13-14) that the decision below conflicts with *In re Request For Assistance From the Ministry Of Legal Affairs Of Trinidad & Tobago*, 848 F.2d 1151 (11th Cir. 1988), cert. denied, 109 S. Ct. 784 (1989). In that case, a district court denied the motion of a bank customer to quash a subpoena the court had issued pursuant to a request for legal assistance from a foreign government. As in this case, the request had been transmitted through the Department of Justice.

The Eleventh Circuit affirmed the district court's decision. In a footnote in its opinion, the court noted that "[t]he records will be released in conformance with the Right to Financial Privacy Act." 848 F.2d at 1156 n.12. The court's statement is unaccompanied by analysis or explanation and appears simply to recite the commissioner's stated intention

---

authority to a court to take reasonable steps, including issuance of a delayed-notice order, to comply with a foreign request for assistance in situations in which 12 U.S.C. 3409 would provide such authority in a domestic case.

in that case. Nothing in the court's brief statement suggests that the Eleventh Circuit has reached a decision on the question whether a commissioner acting pursuant to 28 U.S.C. 1782 *must* meet the requirements of the Financial Privacy Act. Petitioners therefore err in asserting that Eleventh Circuit precedent conflicts with the Second Circuit's decision here.<sup>3</sup>

Indeed, the decision below is the only appellate decision to reach a holding on whether the Right to Financial Privacy Act applies to the Department of Justice when the Department, under the authority of 28 U.S.C. 1782, seeks to aid a foreign government in the investigation of violations of foreign criminal statutes. The questions presented by petitioners have not been explored or developed by *any* other court of appeals. There is thus no conflict in the lower courts, and review by this Court of the questions presented would be unnecessary and premature.

2. The Right to Financial Privacy Act does not create a cause of action for damages against the Department of Justice when an employee of the Department, acting under authority of 28 U.S.C. 1782(a), aids a foreign government in obtaining bank records for use in the foreign government's investigation and prosecution of violations of foreign criminal statutes.

a. First, the Right to Financial Privacy Act does not apply in this case because the statute excludes from its coverage those who, like Commissioner Denton, act as agents of the judicial branch. The key statute on which

---

<sup>3</sup> Petitioners also suggest (Pet. 13) that the decision below is inconsistent with the district court's decision in *In re Request For International Judicial Assistance (Letter Rogatory) From The Federal Republic of Brazil*, 700 F. Supp. 723 (S.D.N.Y. 1988). That decision, however, was rendered by a district court within the Second Circuit and, insofar as it is inconsistent with the Second Circuit's decision, is no longer authoritative.

petitioners rely provides that, absent the customer's written consent, "no *Government authority* may have access to or obtain copies of, or the information contained in the financial records of any customer from a financial institution" unless the requirements of the Act are met. 12 U.S.C. 3402 (emphasis added). A "Government authority" is in turn defined as "any agency or department of the United States, or any officer, employee, or agent thereof," 12 U.S.C. 3401(3) (emphasis added) — a definition that excludes agents or officers of the courts, see *Doe v. Board on Professional Responsibility of the District of Columbia Court of Appeals*, 717 F.2d 1424, 1427 (D.C. Cir. 1983). Because a commissioner acts as an officer of the court — not as an employee or agent of a federal agency or department — he is not a "Government authority" within the meaning of the Act.

The commissioner's function as an agent of the court is made clear from the duties entrusted to him by 28 U.S.C. 1782(a). That statute provides that, in furtherance of the district court's authority to order a person within its district to give testimony or produce evidence for use in a proceeding before a foreign or international tribunal, the court:

may direct that the testimony or statement be given, or the document or other thing be produced, before a person appointed by the court. By virtue of his appointment, the person appointed has power to administer any necessary oath and take the testimony or statement.

The decision to appoint a commissioner is committed by statute to the sound discretion of the district court. See, e.g., *In re Request For Judicial Assistance from Seoul District Criminal Court*, 555 F.2d 720, 724 (9th Cir. 1977); *In re Request For Assistance From the Ministry Of Legal Affairs Of Trinidad & Tobago*, 848 F.2d at 1154; S. Rep. No. 1580, 88th Cong., 2d Sess. 7 (1964). The duty of the commis-

sioner is to facilitate the *court's* power under 28 U.S.C. 1782(a) to order the production of testimony or other evidence for use in a foreign judicial proceeding. See generally Smit, *International Litigation Under the United States Code*, 65 Colum. L. Rev. 1015, 1026-1027 (1965). Once appointed, he derives his power and authority from a judicial appointment, not from any office or employment with the United States. Therefore, as with a special master — whose duties in many respects may parallel those of a commissioner — the fact that a commissioner may hold other employment does not affect his status as an officer of the court when discharging the duties of his appointment.

b. Second, the Right to Financial Privacy Act does not create a cause of action against the government in cases arising out of the appointment of government employees as commissioners because the foreign government — not the government of the United States — has "access to" or "obtains" the documents or information at issue in such a case. Even when he also holds an office with the Department of Justice, a commissioner under the Act is merely a conduit of information to the requesting foreign government or international tribunal.

Every incident of a commissioner's authority and powers reflects the fact that it is the foreign tribunal that obtains and has access to the financial records in question, not a United States "Government authority" as defined by 12 U.S.C. 3401(3). As the court of appeals observed (Pet. App. A12), a government employee can apply for a commission only upon the request of a foreign party, and then only when the requesting party can establish to the court's satisfaction that the evidence sought will be used in a foreign or international tribunal. Moreover, in determining whether to grant an application for appointment as commissioner, a district court is expected to take into account such matters as the nature and attitudes of the requesting government

and the character of the proceedings in the foreign country. S. Rep. No. 1580, *supra*, at 7. Consistent with the purpose of aiding a foreign investigation, an Assistant United States Attorney, if requesting appointment as a commissioner, may also seek to have foreign judges or police officials appointed as co-commissioners, thereby permitting the court's judicial authority to be coupled to the powers of the foreign or international tribunal requesting assistance. See S. Rep. No. 1580, *supra*, at 8; see also United States Attorneys' Manual § 9-13.540 (Oct. 1988). Costs of executing requests for international judicial assistance are accordingly the responsibility of the foreign country, unless otherwise provided by treaty. *Ibid.*

c. Finally, as the district court held, disclosures made under 28 U.S.C. 1782(a) are exempted from the statute's coverage by 12 U.S.C. 3413(d), which provides that the Right to Financial Privacy Act does not authorize the withholding of financial records that must be reported in accordance with federal law (Pet. App. A37). This provision provides a safe harbor for entities—in the present case, Chemical Bank and the Department—that are under compulsion to make disclosures that would otherwise be covered by the Act.<sup>4</sup>

3. As the court of appeals recognized, Congress had good reason to limit the coverage of the Right to Financial Privacy Act in ways that excluded commissioners appointed

---

<sup>4</sup> There is a fundamental difference between administrative subpoenas covered by the Act, and subpoenas issued pursuant to 28 U.S.C. 1782, which come within the exclusion of 12 U.S.C. 3413(d). While issuance of an administrative subpoena is within the discretion of the administrative agency and is therefore never "required" of the agency, issuance of an order appointing a commissioner under 28 U.S.C. 1782(a) is not within the discretion of an administrative agency, but rather is committed to the discretion of the court. Once the order is issued, a federal agency is required to obey it.

pursuant to 28 U.S.C. 1782. In enacting 28 U.S.C. 1782 and reaffirming the courts' power to render international judicial assistance, Congress intended to stimulate reciprocal cooperation from foreign governments in instances where United States law enforcement efforts require the assistance of a foreign judicial tribunal. *John Deere Ltd. v. Sperry Corp.*, 754 F.2d 132, 135 (3d Cir. 1985). While any individual, including a private attorney, can act on behalf of a foreign government and petition the district court for judicial assistance under 28 U.S.C. 1782, the likelihood of fostering reciprocal assistance abroad is obviously greater when such assistance is rendered by the government law enforcement officials who are likely to require the cooperation of foreign governments in the future. The record in this case makes it plain that the Attorney General of Bermuda contacted the United States Attorney's Office for assistance precisely because Bermuda gave analogous United States requests for assistance the highest priority and expected that its own request for assistance would be given equivalent and reciprocal treatment (see C.A. App. A26). In applying for a commission to assist this Bermudian investigation, AUSA Denton was acting to preserve this reciprocal cooperation between the United States and Bermuda. Cf. *United States v. Stuart*, 109 S. Ct. 1183 (1989).

4. Petitioners maintain that Commissioner Denton was, on the particular facts of this case, not merely aiding a foreign investigation but also acting in furtherance of the law enforcement interests of the United States (Pet. 21). In support of this assertion, petitioners cite the court's order permitting the Department of Justice to retain copies of the records for such use as the Attorney General or his designated representative may deem appropriate (*ibid.*).<sup>5</sup>

---

<sup>5</sup> The record shows that there is a very real danger in failing to maintain copies of materials obtained by the commissioner, as some correspondence pertaining to the Bermudian government's request for

There is, however, nothing in the record that supports the bald assertion that AUSA Denton used the office of commissioner to further a United States law enforcement investigation into petitioners' activities. Denton's application stated that he requested appointment as commissioner for the purpose of aiding a request for international judicial assistance issued by the government of Bermuda (C.A. App. A27). He averred that the copies retained by the Department of Justice had not been used for any other purpose (C.A. App. A22-A23). The district court found that assertion to be true (Pet. App. A40). The facts of this case thus do not present any question concerning domestic use of material obtained by a commissioner.<sup>6</sup>

---

international judicial assistance was in fact delayed or misdirected in the mails. See C.A. App. A18-A19.

<sup>6</sup> Petitioners also claim (Pet. 27) that the Department knew or should have known that 28 U.S.C. 1782(a) was not available in this case because the assistance was sought for use in a "preliminary investigation" of a criminal matter. This question was not addressed or passed upon by the court of appeals or the district court, and is thus not before the Court on this petition. In any event, however, the information in this case was sought as part of, and ultimately used in, a criminal prosecution before an impartial judge (C.A. App. A13). See *In re Request For Assistance From Ministry Of Legal Affairs Of Trinidad & Tobago*, 848 F.2d 1151, 1154-1155 (11th Cir. 1988), cert. denied, 109 S.Ct. 784 (1989). This case was thus not controlled by the cases cited by petitioners, *Fonseca v. Blumenthal*, 620 F.2d 322 (2d Cir. 1980), and *In re Letters Rogatory Issued by the Director of Inspection of the Government of India*, 385 F.2d 1017 (2d Cir. 1967), in which the information was sought solely for the use of a government official who could not be characterized as an impartial adjudicator, or "tribunal."

**CONCLUSION**

The petition for a writ of certiorari should be denied.  
Respectfully submitted.

KENNETH W. STARR  
*Solicitor General*  
STUART M. GERSON  
*Assistant Attorney General*  
LEONARD SCHAITMAN  
JEFFREY CLAIR  
*Attorneys*

JANUARY 1990

